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No. 336

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JAMES D. NOLAN,

Appellant,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO, ET AL.,

Appellees.

MOTION TO AFFIRM ORDERS OF FEDERAL DISTRICT COURT

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MOTION TO AFFIRM ORDERS OF FEDERAL DISTRICT COURT BECAUSE OF INSUBSTANTIALITY OF QUESTIONS PRESENTED

Appellees, pursuant to Rules 16 (1)(c) and 35 of the Revised Rules of this Court, move that the judgment of the District Court be affirmed on the basis that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTION PRESENTED

Appellant has presented six questions for the Court's consideration. Apellees respectfully suggest that there is really one question in this appeal:

> Did the District Court err in invalidating and refusing to follow sections of the Ohio Constitution relating to apportionment, which sections, under appellant's figures, would have resulted in a population variance

ratio of 2.6:1 for the House, and 3.4:1 for the Senate, and in adopting instead an interim apportionment plan proposed by the State apportionment officials, which had a maximum population variance ratio of 1.3:1 for both the House and Senate?

STATEMENT

In September, 1965, a United States District Court was considering cases attacking the apportionment of both the Ohio House and Senate. On September 8 and 27, 1965, the Governor, Auditor and Secretary of State, who have been solely responsible for apportionment duties in Ohio since 1851, met and were advised by the Attorney General that the apportionment of both the Ohio House and Senate were invalid under the rule of *Reynolds v. Sims*, 377 U.S., 533. Those officials, who are appellees here, then adopted a new apportionment, which the Attorney General advised them met the requirements of the United States Constitution, and those sections of the Ohio Constitution which were valid. On October 15, 1965, appellees presented that plan to the District Court for its approval. On October 27, 1965, the District Court declared the 1961 apportionment of both the House and Senate to be invalid, and adopted as an interim measure, the plan presented for each house by the appellees. The court remitted to the Ohio Courts the question of the appellee's power to make such an apportionment. (See the Opinion of October 27, 1965, Appendix A, jurisdictional statement.)

Article XI of the Ohio Constitution regulates apportionment in Ohio. All parties agree that at least two provisions of that article are invalid. However, the District Court found that additional provisions were also invalid. Appellees agree. That is why those additional provisions were not followed in their plan. Appellant contends that those

additional provisions are valid, and should have been followed in making the new apportionment.

Appellant indicates that he has plans for apportionment of the Ohio House and Senate which follow those additional provisions *and* meet the requirements of the United States Constitution. It is, therefore, appropriate to examine appellant's proposals.

Appellant did not present a plan for apportionment of the Senate to the District Court, but instead contended that the existing apportionment was constitutional. This was in spite of that Court's order of September 15, 1965, (Appendix A hereto) requesting that on or before October 15, 1965, each party should file, with the Court a "suggested plan for the reapportionment of the Ohio Senate." Nor does appellant present a plan for reapportionment of the Senate to this Court. The Senate apportionment appearing on pages 80a and 81a of the jurisdictional statement is the 1961 Senate apportionment, which the District Court held invalid. Appendix G of appellant's jurisdictional statement, pages 82a through 94a, purports to provide statistics on a "Reapportioned Ohio Senate". Unless those statistics refer to the unconstitutional 1961 apportionment, appellees do not know upon what they are based. If the "Reapportioned Ohio Senate" differs from the unconstitutional 1961 Senate, apellant's jurisdictional statement does not indicate what those differences are. However, appellant's statistics show that whatever the "Reapportioned Ohio Senate" is, it has a maximum population variance ratio of 3.4:1 (Appendix G, Table XXIII, page 88a of jurisdictional statement.)

According to Appendix G, Table XXIII, page 88a, of appellant's jurisdictional statement, in the 107th General Assembly (1967 to 1968), that "Reapportioned Ohio Senate" would have 6 out of 20 districts, or 30%, with a popu-

lation of at least 1½ times that of the smallest district. By the same table, in the 109th Assembly, (1971 to 1972) 16 out of 20 districts, or 80% would have a population at least 1½ times that of the smallest district, and 12 out of those 20, or 60%, would have a population at least double that of the smallest district.

Appellant complains that there was no opportunity to be heard on the merits of the apportionment of the Senate —that hearing having been held before consolidation of the cases was ordered. However, appellant's attorney, Mr. Weinberg, was counsel for the Senate minority leader in that hearing. In such capacity Mr. Weinberg was granted equal time for oral argument and argued the merits of the case without limitation. He was asked whether he desired to present evidence, and responded in the negative. He did not request an opportunity to supplement his oral argument by brief. (See the October 18, 1965, opinion of the District Court, Appendix C, page 19a, jurisdictional statement.)

In regard to appellant's plan for apportionment of the House of Representatives, the population variance ratio between the largest and smallest districts for each legislature during the 10 year period, 1963 through 1972, as taken from appellant's Appendix G, Table VIII, page 62a of the jurisdictional statement, is as follows:

105th General Assembly 1.8:1 (2 Districts)
106th General Assembly 1.8:1 (2 Districts)
107th General Assembly 1.9:1
108th General Assembly 1.9:1
109th General Assembly 2.6:1

Further, according to this same Appendix G, Table VIII, in the 107th General Assembly (1967 through 1968), 18 of the 47 House Districts, or 38%, have a population of at

least 1½ times that of the smallest district. By the same table, in the 109th General Assembly (1971 through 1972), 41 of the 47 House Districts, or 87%, have a population of more than 1½ times that of the smallest district. In that 109th General Assembly, four districts have a population at least double that of the smallest district.

In contrast to appellant's proposals, the plan presented by appellees, and adopted by the District Court, has the following characteristics. The population of the "ideal" district was determined by dividing the population of the State by the Ohio Constitutional divisor of 100 (Article XI, Section 1). Single member districts were then created, with no district having a population less than 85% of that figure, nor more than 115% thereof. No county was divided when it fell within that 85 to 115% range, and in establishing districts, pre-existing political boundaries were used. (Opinion of October 27, 1965, Appendix A, page 4a, jurisdictional statement.) The Senate Districts were formed by combining three contiguous house districts. The population of each district is between 85 and 115% of the population of the ideal district, determined by dividing the population of the State by the Senate membership of 33. (Opinion of October 27, 1965, Appendix A, page 5a, jurisdictional statement.) Thus the maximum population variance ratio for both houses is 1.3:1.

CONCLUSION

In this appeal, we have an appellant, as a citizen and taxpayer, stating that the District Court erred when it did not adopt a plan of apportionment which would have had a maximum population variance ratio of 2.6:1 for the House and 3.4:1 for the Senate. Appellant complains that instead of adopting such a plan, the District Court adopted

a plan presented by the appellees, who have been charged with apportionment duties in Ohio since 1851, which plan had a maximum population variance ratio of 1.3:1, and which the District Court found met every requirement of the United States Constitution.

Wherefore, it is respectfully submitted that the orders of the United States District Court should be affirmed.

Respectfully submitted,

/s/ WILLIAM B. SAXBE,
Attorney General.

PROOF OF SERVICE

I William B. Saxbe, Attorney General of Ohio, attorney for James A. Rhodes, Governor of Ohio, et al., appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 10th day of January, 1966, I served copies of the foregoing Motion to Affirm to the Supreme Court of the United States on the several parties thereto as follows:

Mr. Stewart R. Jaffy, attorney for James Nolan,
42 East Gay Street, Columbus, Ohio
Mr. Harry P. Jeffrey, attorney for Clarence Blosser,
Third National Building, Dayton, Ohio
Mr. Jerome Goldman, attorney for Leonard Sive,
First National Bank Building, Cincinnati, Ohio

/s/ WILLIAM B. SAXBE,
Attorney General of Ohio
Attorney for James A. Rhodes,
Governor of Ohio, et al.
State House Annex
Columbus, Ohio

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action No. 6082
Civil Action No. 6491

JAMES D. NOLAN,

Plaintiff,

v.

JAMES A. RHODES, GOVERNOR OF OHIO, ET AL.,

Defendants.

LEONARD M. SIVE, ET AL.,

Plaintiffs,

v.

HARRY ELLIS, ET AL.,

Defendants.

ORDER

[Filed September 16, 1965]

The Court has been advised that the Ohio General Assembly did not adopt a reapportionment plan for the Ohio Legislature in accordance with the order of this Court dated October 15, 1964.

The Court therefore requests the following:

That each party to these actions and/or their counsel file on or before October 15, 1965 a suggested plan for the reapportionment of the Ohio House of Representatives and a suggested plan for the reapportionment of the Ohio Senate.

Further, any person or persons may within the same period of time, and upon leave of this Court, file a suggested plan for the reapportionment of the Ohio House of Representatives and a suggested plan for the reapportionment of the Ohio Senate.

/s/ PAUL C. WEICK,
Chief Judge of Court of Appeals,
/s/ CARL A. WEINMAN,
Chief Judge, U. S. District Court,
/s/ JOHN W. PECK,
Judge, U. S. District Court.